No. 93-931889 MAY 27 1994

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

AMERICAN EXPRESS BANK LTD.,

Petitioner,

—v.—

SHEERBONNET LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court is empowered to abstain from exercising jurisdiction over a vexatious or contrived federal court action predicated on diversity jurisdiction, in deference to previously-commenced state court proceedings designed to address and resolve the state-law claim presented.

2. Whether the decision of a district court to abstain is reviewed by the court of appeals pursuant to a *de novo* or an abuse of discretion standard of review.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner American Express Bank Ltd. was defendant-appellee below; Respondent Sheerbonnet Limited was plaintiff-appellant below.

Pursuant to Supreme Court Rule 29.1, Petitioner provides the following information: The parent corporation of American Express Bank Ltd. is American Express Company, and its publicly-traded affiliate is First Data Corporation.

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v.

SHEERBONNET LIMITED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

American Express Bank Ltd. ("AEB") petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 17 F.3d 46 (2d Cir. 1994). The order of the court of appeals

granting Petitioner's motion for a stay of the issuance of the mandate pending the application for writ of certiorari (App. B) is unreported. The order of the court of appeals denying Petitioner's petition for rehearing and suggestion for rehearing *in banc* (App. C) is unreported. The opinion of the district court granting Petitioner's motion to dismiss (App. D) is unreported. The judgment of the district court dismissing the action (App. E) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1994, and the order denying rehearing, with a suggestion for rehearing *in banc*, was entered on April 12, 1994. This Court has jurisdiction to issue the requested writ under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reprinted at Appendices F and G.

STATEMENT

This action involves the abstention power of a district court, the standard of appellate review of a district court's decision to abstain, and the distribution of judicial power within our federal system. Specifically, AEB's petition raises two questions: (1) whether a district court is empowered to abstain from exercising jurisdiction over a contrived or vexatious federal court action predicated on diversity jurisdiction, in deference to previously-commenced state court proceedings designed to address and resolve the state-law claim presented; and (2) whether the decision of a district court to abstain is reviewed by the court of appeals pursuant to a *de novo* or an abuse of discretion standard of review.

These issues warrant review by this Court for three reasons. First, similar issues were recently presented to this Court in *Granite State Insurance Co. v. Tandy Corp.*, 986 F.2d 94 (5th Cir.), *cert. granted,* 113 S. Ct. 51 (1992), *cert. dismissed,* 113 S. Ct. 1836 (1993), but they remain unresolved. Second, the decision of the court of appeals creates a conflict among the circuits and cannot be reconciled with *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 17-18 n.20 (1983), in which this Court recognized that a district court *is* empowered to abstain from exercising jurisdiction over a contrived or vexatious federal court action in deference to state court proceedings. Third, the court of appeals below, in conflict with the vast majority of the courts of appeals, articulated a hybrid plenary/abuse of discretion standard of appellate review, and exercised, in effect, a plenary or *de novo* standard pursuant to which it substituted its judgment for that of the district court. Review by this Court therefore is plainly warranted.

1. Petitioner AEB is a banking institution with its principal place of business in New York City. In the ordinary course of its business, AEB engaged in correspondent banking with the Bank of Credit and Commerce International ("BCCI"). Sheerbonnet Limited ("Sheerbonnet"), the Respondent herein, is alleged to be a trading company with its principal place of business in London, England. Sheerbonnet alleges that in May, 1991, it fulfilled its obligations under a letter of credit. On July 3, 1991, Banque Scandinave allegedly advised its correspondent bank, Northern Trust, to transfer approximately $12.4 million to a BCCI S.A. account located at AEB. (JA 8 at ¶ 12).[1] Pursuant to its instructions from Northern Trust, AEB credited $12.4 million to the account of BCCI S.A. at AEB in New York on July 5, 1991. BCCI S.A. purportedly was to credit Sheerbonnet's account at the

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[1] Citations to "JA" refer to the Joint Appendix previously filed with the court of appeals.

London branch of BCCI S.A. (JA 8 at ¶ 11); AEB was never instructed to credit funds to Sheerbonnet, nor to Sheerbonnet's account at BCCI S.A. in London. On July 5, 1991, however, banking regulators took over BCCI's offices around the world and BCCI never paid Sheerbonnet. Sheerbonnet is a creditor of BCCI.

In New York, the Superintendent of Banks of the State of New York (the "Superintendent") exercised the authority under Section 606(4) of the New York Banking Law to take possession of the business and property of BCCI S.A. (one of BCCI's principal subsidiaries) in New York, including the $12.4 million credited to the BCCI S.A. account at AEB, as well as the business and property of the New York Agency of BCCI S.A. wherever located. (JA 37.) The Superintendent obtained an order from the New York State Supreme Court requiring the consolidation of all BCCI-related matters before one New York state court: the Liquidation Court. (JA 21.)

2. In March 1992, the Superintendent commenced a special proceeding before the Liquidation Court to compel major New York banks, including AEB (the "Banks"), to turn over funds of BCCI S.A. held on deposit in New York, including the $12.4 million credited to the account of BCCI S.A. at AEB on July 5, 1991. (JA 92-94.) Ultimately, the Banks and the Superintendent agreed to the terms of a proposed turnover order. Sheerbonnet, among others, was served with notice of the proposed turnover order, which instructed that: (a) the order would be presented to the Liquidation Court on April 27, 1992, for settlement and signature unless an objection to the entry of the order were to be timely filed and served; (b) objections to entry of the order were to be filed with the Court and served not later than April 22, 1992; and (c) in the event an objection to the entry of the proposed order were to be timely filed and served, a hearing would be held before the Liquidation Court on April 27, 1992.

(JA 122-23, 144.) Publication notice of the proposed turnover order was also effected. (JA 150.)

Sheerbonnet did not object to the proposed turnover order, did not appear at the hearing scheduled by the Liquidation Court, and did not declare any interest in the $12.4 million credited to BCCI's account at AEB. In the absence of any such objection or claim, the Liquidation Court entered the turnover order (the "Turnover Order"), compelling the Banks, including AEB, to remit to the Superintendent amounts credited to the New York accounts of BCCI S.A., including the $12.4 million credited to the account of BCCI S.A. on July 5, 1991, net of claimed setoffs and debits. (JA 151-56.) The Turnover Order discharged AEB from liability with respect to claims for BCCI S.A. funds located in New York, and permanently enjoined all persons and entities from asserting any claim or cause of action against AEB for funds of BCCI S.A. located in New York. (JA 156.)

3. Given BCCI's failure to remit $12.4 million to Sheerbonnet, Sheerbonnet filed a petition with the U.S. District Court for the District of Columbia (the "D.C. District Court"), alleging that its bank was BCCI in London and that it sought recovery of $12.4 million "in funds apparently transferred to American Express on July 5, 1991 . . . which funds were credited by American Express to an account maintained in the name of Bank of Credit and Commerce International, S.A." (JA 269.) Sheerbonnet's petition is pending.

4. Although it failed to pursue its claim in the Liquidation Court and its petition was pending before the D.C. District Court, Sheerbonnet commenced an action against AEB in the U.S. District Court for the Southern District of New York on October 9, 1992. Invoking diversity jurisdiction and proceeding upon state-law principles of tort and equity, Sheerbonnet seeks recovery of $12.4 million from AEB. In an attempt to insure itself against

the failure of its bank, Sheerbonnet now alleges that it owned the $12.4 million credited to BCCI's account at AEB, and that AEB is liable to Sheerbonnet because AEB wrongfully credited the $12.4 million to BCCI's account at AEB. Rather than seek through the Liquidation Court the $12.4 million that Sheerbonnet now alleges was its property, Sheerbonnet seeks money damages from AEB in federal court.

5. On December 14, 1992, AEB moved to dismiss Sheerbonnet's complaint on various grounds, including that the Court should abstain from exercising jurisdiction over the action. On March 12, 1993, after discovery, extensive briefing, and oral argument, the district court granted AEB's motion to dismiss, and abstained from exercising jurisdiction under the doctrine announced in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Emphasizing that it was "[a]ware of the strong presumption in favor of a federal court's adjudicating all controversies brought before it," the district court held that the action was "a classic case where federal abstention is appropriate under Burford." (App. 15a.)

The district court found that Sheerbonnet had sought "to elevate form over substance by attempting to relabel its claims as tort claims against AEB," in an attempt to "circumvent" the ongoing liquidation proceedings in State court. (*Id.*) This determination was based upon a careful consideration of Sheerbonnet's complaint and the proceedings of the Liquidation Court and the D.C. District Court, all of which established that Sheerbonnet's federal court action was, in essence, a claim of ownership of and entitlement to the $12.4 million that was credited to the BCCI account at AEB. (App. 15a-16a.) The district court recognized that the Liquidation Court had adjudicated similar claims alleging the mishandling of BCCI funds, and thus, the Liquidation Court provided an appropriate forum for Sheerbonnet. (App. 16a.) Relying upon *Burford* and *BankAmerica International*

v. Bank of Credit & Commerce International, S.A., 91 Civ. 4913 (LBS), 1992 WL 88204 (S.D.N.Y. Apr. 17, 1992), the district court abstained in deference to the comprehensive and consolidated proceedings before the Liquidation Court. *(Id.)*

6. The court of appeals reversed the judgment of the district court. It held, as a matter of law, that it was irrelevant "whether Sheerbonnet is elevating 'form over substance by attempting to relabel its claims as tort claims against' American Express" in an effort to circumvent the Liquidation Court. (App. 7a.) The sole issue, according to the court of appeals, is the "viability" of the complaint, and because the complaint on its face implicated no state interest, abstention in deference to the Liquidation Court was improper. (*Id.*) In reviewing the district court's decision, the court of appeals employed a hybrid standard that subjected legal questions to a *de novo* or plenary standard, and purported to subject the decision to abstain to an abuse of discretion standard. In effect, however, the court below exercised a *de novo* or plenary standard of review and accorded no weight to the district court's finding that Sheerbonnet's claim implicated the regulatory interests of New York.

REASONS FOR GRANTING THE PETITION

1. The two issues presented in this case are closely related to those raised in *Granite State Insurance Co. v. Tandy Corp.*, 986 F.2d 94 (5th Cir.), *cert. granted*, 113 S. Ct. 51 (1992), *cert. dismissed*, 113 S. Ct. 1836 (1993). In *Granite State*, this Court granted the petition for certiorari raising two issues: (1) "In reviewing decision by district court to abstain from exercising clear federal jurisdiction in declaratory judgment action, does court of appeals determine abstention issues *de novo*, or on basis of whether district court abused its discretion?"; and (2) "May federal district court that clearly has jurisdiction over declaratory judgment action in case brought pursuant to federal law, abstain

from exercising that jurisdiction in light of later-filed action in state court?" 61 U.S.L.W. 3118 (Aug. 18, 1992). After full briefing and oral argument, certiorari was dismissed pursuant to Supreme Court Rule 46. *Granite State*, 113 S. Ct. 1836 (1993). AEB's petition presents this Court with another opportunity to address and resolve issues akin to those raised in *Granite State*.

2.a. The Second Circuit's decision below—that the district court is not empowered to abstain from exercising jurisdiction over a vexatious or contrived federal action—cannot be reconciled with this Court's decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. at 17-18 n.20. *See also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-18, *reh'g denied*, 426 U.S. 912 (1976); *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 n.8 (1978). In *Moses H. Cone*, this Court recognized that the federal court is empowered to consider the "contrived," "vexatious" or "reactive" nature of a federal court action in deciding whether to abstain. 460 U.S. at 17-18 n.20. The Second Circuit's decision also squarely conflicts with those of the First, Fifth, Seventh and Ninth Circuits, which hold, in diverse jurisdictional settings, that the vexatious or reactive nature of the federal court action is a factor that may be considered by the district court upon an abstention motion. *See Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 947 F.2d 529, 533-34 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 1674 (1992); *Granite State Ins. Co. v. Tandy Corp.*, 986 F.2d at 96; *Calvert Fire Ins. Co. v. American Mut. Reins. Co.*, 600 F.2d 1228, 1234 & n.14 (7th Cir. 1979); *Nakash v. Marciano*, 882 F.2d 1411, 1417 (9th Cir. 1989).

b. Without citation to authority, the Second Circuit summarily divests the district court of the power to abstain from exercising jurisdiction over vexatious or contrived federal court actions in deference to state court proceedings. As Chief Judge

Learned Hand made clear, the "privilege of access to [the] federal court[s]" is not "absolute and indefeasible" and the district court is empowered to abstain "because a proper regard for the autonomy of the states makes that course desirable," or to allow the district court "'to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'" *Mottolese v. Kaufman*, 176 F.2d 301, 302-03 (2d Cir. 1949) (citation omitted). The Second Circuit's decision sweeps aside this teaching and the public policies of comity and judicial economy that together and separately animate the abstention doctrine, without serving any genuine federal interest. Review by this Court is warranted to resolve the conflict between the Second Circuit's decision and those of this Court and the First, Fifth, Seventh and Ninth Circuits, and to address an issue of fundamental importance to the definition of federal judicial power.

3.a. The Second Circuit's decision below—exercising plenary, *de novo* review of the district court's decision to abstain—heightens the circuit conflict that remains unresolved in the aftermath of *Granite State*. The Second and Sixth Circuits employ a plenary or *de novo* standard of appellate review. *Sheerbonnet, Ltd. v. American Express Bank Ltd.*, 17 F.3d 46, 48 (2d Cir. 1994); *Baskin v. Bath Township Bd. of Zoning Appeals*, 15 F.3d 569, 571 (6th Cir. 1994). In contrast, the First, Fourth, Fifth, Seventh, Eighth, Tenth and Eleventh Circuits employ an abuse of discretion standard. *See Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 13 (1st Cir. 1990); *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993); *Granite State Ins. Co. v. Tandy*, 986 F.2d at 96; *A.G. Edwards & Sons, Inc. v. Public Bldg. Comm'n*, 921 F.2d 118, 121 (7th Cir. 1990); *United States Fidelity & Guar. Co. v. Murphy Oil USA, Inc.*, No. 93-2118, 1994 WL 115091, at *3 (8th Cir. Apr. 8, 1994); *Fox v. Maulding*, 16 F.3d 1079, 1082 (10th Cir. 1994); *Rindley v. Gallagher*, 929 F.2d 1552, 1554 (11th Cir. 1991). The issue presented by this circuit conflict is of broadly

recurring importance in the federal courts, and review by this Court is warranted to resolve the conflict.

b. The importance of resolving this circuit conflict is underscored by the singular analysis of the court of appeals in its decision below:

> At the outset, we note that we review the decision to abstain for abuse of discretion. The underlying legal questions, however, are subject to plenary review. *DeCisneros v. Younger*, 871 F.2d 305, 307 (2d Cir. 1989).

(App. 5a.) The review undertaken by the court of appeals was, in effect, *de novo* or plenary. It held that the sole inquiry of the district court was the "viability" of the complaint, and thereby both uncritically assumed the truth of the complaint's allegations and foreclosed consideration of facts outside of the pleading. (App. 6A-7a.) This approach is classic *de novo* review and is akin to that employed to review a district court's dismissal of a complaint for failure to state a claim. *See, e.g., Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Moreover, the district court's finding that the claim implicated the regulatory interests of the State of New York, based upon matters outside of the pleading, was accorded no weight on appeal. The Second Circuit's articulation of a hybrid plenary/abuse of discretion standard of review, and its decision to exercise *de novo* review in conflict with the decisions of the vast majority of courts of appeals, underscore the need for authoritative guidance from this Court concerning the proper standard of appellate review in the abstention context.[2]

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[2] That the Second Circuit "expressly acknowledged that the standard of review was one of abuse of discretion" is not

(continued...)

c. The Second Circuit's decision to limit the district court's inquiry to the viability of the claim as it appears on the face of the pleading is unprecedented and cannot be reconciled with this Court's abstention decisions. The *Burford* and *Colorado River* abstention doctrines, by their very nature, *compel* a district court to investigate the scope of the pending state proceedings, a matter that will not be disclosed in the complaint of a party determined to circumvent state-court proceedings. This Court has held that the district court, in deciding whether to defer to a state proceeding, may consider the scope of the pending state court proceeding, the nature of available defenses, whether the claims of all parties in interest can satisfactorily be adjudicated, and whether necessary parties have been or can be joined. *Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 495, *reh'g denied*, 317 U.S. 704 (1942). Thus, the Second Circuit's decision bars a district court from performing the very inquiry mandated by this Court.

4. It has been understood, since the earliest days of this nation, that "the national and State systems are to be regarded as ONE WHOLE." The Federalist No. 82, at 494 (A. Hamilton) (C. Rossiter ed., 1961) (emphasis in original); *see Younger v. Harris*, 401 U.S. 37, 44 (1971); *Claflin v. Houseman*, 93 U.S. 130, 137 (1876). The decision below upsets the delicate balance of our federal system. It grants to private plaintiffs the unreviewable power and unfettered discretion to circumvent the state system and the state court proceedings designed to hear their

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[2](...continued)
decisive; the reality is that the Second Circuit "substituted its own judgment for that of the District Court." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981), *reh'g denied*, 455 U.S. 928 (1982). In any event, it makes no practical difference whether the Second Circuit employed a *de novo* standard, or an exacting abuse of discretion standard that is the functional equivalent of a *de novo* standard of review. *United States Fidelity*, 1994 WL 115091, at *4 n.5.

claims. It impermissibly reduces the abstention doctrine "to a pleader's option" and thereby jettisons "the fundamental interests served by the doctrine." *Zwickler v. Koota*, 389 U.S. 241, 257 (1967) (Harlan, J., concurring). This enlargement of the role of federal courts, and concomitant vitiation of the power of state courts in an area of traditional state concern, erode basic principles of federalism and comity and should not be countenanced by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be reversed.

Dated: May 27, 1994

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 93-7330

SHEERBONNET, LTD.,

Plaintiff-Appellant,

—against—

AMERICAN EXPRESS BANK LTD.,

Defendant-Appellee.

February 22, 1994

B e f o r e: VAN GRAAFEILAND, PRATT and WALKER, *Circuit Judges.*

GEORGE C. PRATT, *Circuit Judge*:

This is one of many cases arising out of the seizure in July 1991 of the assets of the Bank of Credit and Commerce International ("BCCI"). Despite its having secured one of the most reliable methods of payment—an irrevocable letter of credit from a Swiss bank— Sheerbonnet, Ltd., stymied by the chance convergence of its "payment due" date with the shutdown of BCCI's worldwide operations, never was paid for work it did. While the payment was on its way from New York to Sheerbonnet's bank account in London, it was swept up in the state regulations that govern the assets of failed banking institutions. By a diversity action in the United States District Court for the Southern District of New York, Loretta A. Preska, Judge, Sheerbonnet seeks damages from American Express, one of the banks through which Sheerbonnet's payment was being transferred. The district court dismissed the complaint in deference to ongoing state proceedings under the abstention principles of *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). For the reasons set forth below, we reverse.

FACTS AND BACKGROUND

In October 1990 Sheerbonnet, a British company, entered into a contract to sell troop carriers to Hady Establishment ("Hady"), a Saudi Arabian company, for the Allied forces to use in the Persian Gulf War. To pay for the carriers, Hady obtained an irrevocable letter of credit in favor of Sheerbonnet from a Swiss bank, Banque Scandinave. The $14,080,000 purchase price was to be paid in two installments—10 percent as a down payment and the remaining 90 percent due 60 days after the bill of lading date.

Sheerbonnet received the down payment and fulfilled all of its obligations under the contract. As a result, the final installment

of $12,441,600 was due on July 5, 1991. Sheerbonnet wanted the payment, which was to be made in American dollars, deposited to its account with BCCI in London ("BCCI London"). Accordingly, on July 3, 1991, Banque Scandinave informed BCCI London that $12,441,600 would be credited to BCCI London's account 52985 with the American Express Bank in New York ("American Express") for value on July 5, 1991. Banque Scandinave then directed its correspondent bank in New York, Northern Trust International ("Northern Trust"), to make the transfer on July 5.

Due to an ill-timed turn of events, however, Sheerbonnet never received the final installment. Early in the morning of July 5, 1991, regulators in England and Luxembourg suspended the operations of BCCI, S.A. On the same day in the United States, before the start of business on the East Coast, the Federal Reserve Bank advised several banks, including American Express, that BCCI worldwide had been closed and that BCCI's New York Agency would be seized. At 9 a.m. E.D.T., the Superintendent of Banks of the State of New York ("Superintendent") closed the New York Agency of BCCI and announced the seizure of all BCCI "business and property" located within New York.

Less than a quarter of an hour later, American Express received from Northern Trust a payment message for the transfer of $12,441,600 through American Express to BCCI London, in accordance with Banque Scandinave's July 3 telex. Although it already knew that BCCI's operations, in New York and elsewhere, had been suspended, American Express accepted the message and "credited" BCCI London's account 52985. Because BCCI's New York assets had been frozen, the money remained in New York.

Acting under the authority granted him by section 606(4)(a) of New York's Banking Law, the Superintendent initiated a liquidation proceeding in the Supreme Court of New York ("Liquidation Court") to dispose of BCCI's assets. In March 1992

the Superintendent petitioned the Liquidation Court for an order compelling several New York banks, including American Express, to turn over funds of BCCI that they held on deposit, net of the banks' setoffs. After the Superintendent and the banks reached a settlement agreement, the Liquidation Court entered a turnover order on April 27, 1992, which directed the banks to remit to the Superintendent funds in the New York accounts of BCCI, net of claimed setoffs and debits. Upon such remittance, the turnover order provided, the banks would be "discharged from liability with respect to claims for funds of BCCI, S.A. located in New York."

American Express did not turn over to the Superintendent any of the funds from the BCCI London account, because it claimed a right to those funds as a setoff against debts owed to it by BCCI. Thus, the money originally destined for Sheerbonnet ended up not in the hands of the buyer or the seller, but of a bank whose only role was to transfer the funds.

In October 1992 Sheerbonnet sued American Express in the United States District Court for the Southern District of New York, alleging conversion, tortious interference with contract, and unjust enrichment. In essence, Sheerbonnet claimed that American Express should not, without notifying either the sender or the intended recipient, have accepted the funds from Northern Trust or "credited" them to BCCI London's account when it knew that the BCCI assets had been frozen. In addition, Sheerbonnet argued that American Express "made a conscious decision to turn its knowledge and position [in the transfer transaction] to its own advantage", because American Express knew that under New York law it would be able to retain the funds as a setoff against BCCI's debts to American Express.

Judge Preska dismissed Sheerbonnet's complaint, holding that under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), abstention

was required in deference to the state liquidation proceedings. Sheerbonnet now appeals.

DISCUSSION

At the outset, we note that we review the decision to abstain for abuse of discretion. The underlying legal questions, however, are subject to plenary review. *De Cisneros v. Younger*, 871 F.2d 305, 307 (2d Cir. 1989).

American Express urges us to affirm the district court's decision to abstain under the *Burford* doctrine or, in the alternative, to hold that abstention was proper under the principles articulated in *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). We address each contention in turn.

A. Burford *Abstention*

The *Burford* doctrine requires federal courts to abstain from deciding questions of state law when federal review would disrupt a state's efforts to establish a coherent policy on a matter of substantial importance to the state. *See Colorado River*, 424 U.S. at 814; *City of Hartford v. Chase*, 942 F.2d 130, 136 (2d Cir. 1991); *Alliance of Am. Insurers v. Cuomo*, 854 F.2d 591, 599 (2d Cir. 1988).

In *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350 (1989), the Supreme Court capsulized the principles underlying the *Burford* doctrine.

> Where timely and adequate state-court review is available, a federal court * * * must decline to interfere with the

> proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing upon public problems of substantial public import whose importance transcends the result in the case at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

Id. at 361 (quoting *Colorado River*, 424 U.S. at 814).

In deciding to abstain, Judge Preska adopted Judge Sand's reasoning in *BankAmerica International v. Bank of Credit & Commerce, International, S.A.*, No. 91 CIV 4913, 1992 U.S. Dist. LEXIS 5137 (S.D.N.Y. Apr. 17, 1992) (*BankAmerica*), another case that involved the handling of BCCI's New York assets. Citing the *Burford* doctrine, Judge Sand abstained in favor of the state liquidation proceedings. However, *BankAmerica* provides a poor analogy. While the *BankAmerica* plaintiff claimed it had an entitlement to particular BCCI monies that was superior to the Superintendent's, Sheerbonnet has no dispute with the Superintendent. Sheerbonnet is not contesting the Superintendent's possession of or authority to liquidate assets of BCCI. Sheerbonnet does not assert a demand for "specific funds". Instead, it alleges a claim for damages against American Express arising out of its tortious conduct in handling the transfer of funds from Banque Scandinave to Sheerbonnet. Specifically, Sheerbonnet targets whether American Express erred by crediting the funds arriving from Banque Scandinave to the BCCI London account when it knew that the transfer could not be completed. Sheerbonnet therefore seeks damages for torts based on American Express's alleged misconduct.

Given such claims, we fail to see how the exercise of federal jurisdiction would impact upon matters of substantial state concern by either deciding a difficult state-law question or disrupting state efforts to establish an important state policy. The outcome of Sheerbonnet's tort claims against American Express can have no impact on the state liquidation.

Because the claims in this case are addressed to American Express's banking conduct, they do not belong in the Liquidation Court. The question to be resolved in this complaint is not whether Sheerbonnet is elevating "form over substance by attempting to relabel its claims as tort claims against" American Express, as the district court seemed to think. Rather, the question is the viability of the tort claims Sheerbonnet has asserted. We reject American Express's contention that even if the tort claims are truly tort claims, they should be resolved by the Liquidation Court.

American Express contends that the Liquidation Court has already heard and resolved virtually identical claims to those advanced by Sheerbonnet. However, the authority cited by American Express does not support its assertion. Furthermore, even if the Liquidation Court could handle Sheerbonnet's claims, it would not affect our decision. The mere existence of concurrent state and federal actions concerning similar matters is not enough to warrant abstention. "Where * * * a federal court properly has subject matter jurisdiction, it has a 'virtually unflagging obligation' to exercise that jurisdiction, even if an action concerning the same matter is pending in state court." *Bethlehem Contracting Co. v. Lehrer/McGovern, Inc.*, 800 F.2d 325, 327 (2d Cir. 1986) (quoting *Colorado River*, 424 U.S. at 817-18); *see New Orleans Pub. Serv. Comm'n*, 491 U.S. at 362 ("While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where

there is a 'potential for conflict' with state regulatory law or policy.") (quoting *Colorado River*, 424 U.S. at 815-16).

Given the "heavy presumption favoring the exercise of jurisdiction", *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 40-41 (2d Cir. 1986), *cert. denied*, 481 U.S. 1017 (1987), and the differences between the claims asserted by Sheerbonnet and those being adjudicated by the Liquidation Court, we hold that the district court abused its discretion in abstaining under *Burford*.

B. Colorado River *Abstention*

In *Colorado River*, the Supreme Court held that a federal court could, in exceptional circumstances, abstain where there are concurrent state and federal proceedings. 424 U.S. at 813. The "exceptional circumstances" necessary for abstaining under *Colorado River* requires the balancing of several factors, *see De Cisneros v. Younger*, 871 F.2d at 307 (listing factors), and the balance should be heavily weighted in favor of the exercise of jurisdiction. *See Moses H. Cone*, 460 U.S. at 16.

We need not examine the factors to determine whether "exceptional circumstances" exist, because the state and federal proceedings here are not "concurrent" in the manner required by the *Colorado River* doctrine. *See Alliance of Am. Insurers*, 854 F.2d at 603 (some overlap of subject matter not enough to make state and federal actions concurrent); *Telesco v. Telesco Fuel and Masons' Materials, Inc.*, 765 F.2d 356, 362 (2d Cir. 1985) (*Colorado River* abstention upheld where federal and state actions were "essentially the same"); *cf. General Glass Indus. Corp. v. Monsour Medical Found.*, 973 F.2d 197, 199 (3d Cir. 1992) (federal and state court proceedings not "truly duplicative" as required for abstention under *Colorado River*).

First, the two proceedings involve different parties. "Similarity of parties is not the same as identity of parties." *Alliance of Am. Insurers*, 854 F.2d at 603. Sheerbonnet is not a participant in the liquidation proceeding, and the creditors seeking funds from the Liquidation Court are not plaintiffs in this case. Significantly, the Superintendent, who initiated the state-court proceedings, has expressed no interest in the pendency of this suit.

Secondly, the proceedings involve different subject matters and different forms of relief. As noted in the previous section, the issues presented here—tort claims against American Express—differ from those pressed before the Liquidation Court—creditor's claims of entitlement to BCCI's assets. *See Alliance of Am. Insurers*, 854 F.2d at 603. While the Liquidation Court is the proper forum for claims that might affect the *res* being administered by the Superintendent, in this case, Sheerbonnet seeks tort damages from American Express, and the outcome of its claims will have no impact on the state liquidation proceeding.

In sum, this is not an appropriate case for either *Burford* or *Colorado River* abstention.

The judgment of the district court dismissing Sheerbonnet's complaint is reversed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 93-7330

SHEERBONNET, LTD.,

Plaintiff-Appellant,

—against—

AMERICAN EXPRESS BANK LTD.,

Defendant-Appellee.

ORDER

IT IS HEREBY ORDERED that the motion be and hereby is granted.

/s/ Ellsworth A. VanGraafeiland
ELLSWORTH A. VANGRAAFEILAND

/s/ George C. Pratt
GEORGE C. PRATT

/s/ John M. Walker, Jr.
JOHN M. WALKER, JR.

Circuit Judges

Date: April 28, 1994

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 93-7330

SHEERBONNET, LTD.,

Plaintiff-Appellant,

—against—

AMERICAN EXPRESS BANK LTD.,

Defendant-Appellee.

Filed April 12, 1994

ORDER

Before VAN GRAAFEILAND, PRATT and WALKER, *Circuit Judges.*

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Defendant-Appellee, American Express Bank Ltd.,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

George Lange III, Clerk

By: /s/ Carolyn Clark Campbell
CAROLYN CLARK CAMPBELL
CHIEF DEPUTY CLERK

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 7426 (LAP)

SHEERBONNET, LTD.,

Plaintiff,

—against—

AMERICAN EXPRESS BANK LTD.,

Defendant.

March 12, 1993

Before: HON. LORETTA A. PRESKA,
District Judge.

APPEARANCES

HOWARD, DARBY & LEVIN
Attorneys for Plaintiff
JACK P. LEVIN
Of counsel

WILLKIE FARR
& GALLAGHER
Attorneys for Defendant
JOSEPH BAIO
JOHN HALLORAN
CARL STINE
Of counsel

MEMO ENDORSED
Defendant's motion to
dismiss is granted and
the case is closed.
SO ORDERED:
Dated: New York, New York
March 18, 1993

/s/ Loretta A. Preska

(In open court)

THE COURT: We ar here today on defendant's various motions to dismiss.

Following extensive briefing and argument on defendant's various motions, defendant's motion to dismiss is granted.

Aware of the strong presumption in favor of a federal court's adjudicating all controversies brought before it, this court is abstaining from exercising its jurisdiction under the doctrine announced, Buford -v- Sun Oil Co., 319 U.S. 315.

For the reasons set forth in Judge Sand's opinion in BankAmerica International -v- Bank of Credit and Commerce International, S.A., Bank of Credit and Commerce International (Overseas) Limited, et al., 91 Civ. 4913, I find this to be a classic case where federal abstention is appropriate under Burford.

Plaintiff's attempts to distinguish itself out from under the Burford doctrine, and by doing so, to circumvent the state litigation proceeding, are, at best, attempts to elevate form over substance by attempting to relabel its claims as tort claims against AEB.

This is particularly apparent in light of plaintiff's statement in the District of Columbia proceeding that, "Sheerbonnet claims an interest in funds apparently transferred to American Express on July 5, 1991 by Banque Scandinave en Suisse of Geneva, Switzerland which funds were credited by American Express to an account maintained in the name of BCCI."

In addition, the allegations contained in paragraphs 3, 18, 22 and 26 of the complaint similarly appear to assert claims to specific funds.

Plaintiff's position is most analogous to that of Bankorp Ltd. as set forth in Justice Baer's decision which appeared in the New York Law Journal of August 10, 1992 and appears in the Baio affidavit at Exhibit G.

Bankorp claimed that Security Pacific, not its banker, improperly failed to effect a funds transfer. Like here, the result of the bank's allegedly wrongful acts was that the funds in question were swept up on July 5 following the superintendent's order.

Like here, Bankorp's funds were caught up in an uncompleted transaction. Like here, Bankorp intended to and, in fact, did business with BCCI.

Bankorp's claim that because of Security Pacific's failure to follow the transfer instructions properly, the money should not have been turned over to the superintendent, was litigated in the liquidation proceedings in the state court. That is where this claim appears to belong.

I also note that although plaintiff has not chosen to assert a claim in that state court liquidation proceeding, plaintiff has asserted one in the District of Columbia proceeding.

For the reasons set forth above, defendant's motion to dismiss is granted on the ground of the Burford doctrine.

MR. LEVIN: May I just have a moment?

THE COURT: Absolutely.

MR. LEVIN: Your Honor, I would like to request that the court condition its order, with which, of course, we take exception, on defendant's agreement to submit to the jurisdiction

of the state court in favor of which your Honor is abstaining and waive any right it may otherwise have to argue that plaintiff's claim should be heard somewhere other than in the state court.

THE COURT: Mr. Baio, do you want to be in the state court; how about it?

MR. BAIO: I cannot agree without talking to my client, your Honor. We will take the position wherever this is litigated that there is no claim against us.

THE COURT: That is a different question. Taking Mr. Levin's point, you have asked this court to abstain in favor of the state court liquidation proceeding on the ground of the Burford doctrine.

MR. BAIO: Correct.

THE COURT: It can hardly lie in your client's mouth to now say they don't belong there. So Mr. Levin's request is granted and the dismissal on abstention grounds is conditioned upon AEB's submission to jurisdiction or, in the alternative, AEB's not arguing in the liquidation proceeding that is the incorrect forum for Sheerbonnet's claims.

MR. BAIO: I take it—so it is clear that that does not preclude us from arguing that no claim can be laid against American Express Bank.

THE COURT: You can always argue there is no claim, there is no merit to the claim. That is the merits.

Mr. Levin's point which I think is well taken is a jurisdictional point. If you say this claim should be litigated in the liquidation proceeding, it cannot lie in your mouth later to say it

doesn't belong there, so with those conditions the motion is granted.

MR. BAIO: There will also be an argument that the claim is late because they did not file when they had notice.

THE COURT: That is a different problem. That is not a jurisdictional problem.

MR. BAIO: So the claim is stale.

THE COURT: That is a different problem. That should be litigated there.

Do what you will with that but it cannot lie in American Express' mouth to say that Mr. Levin's client cannot—

MR. BAIO: Sue us in New York.

THE COURT: Sue you in the liquidation proceeding in New York State because that proceeding is not the proper forum.

MR. BAIO: The superintendent, of course, can take whatever position it wants.

THE COURT: Anybody can take whatever position it wants.

Thank you, gentlemen.

Your briefs and your arguments were a pleasure.

MR. LEVIN: Thank you.

MR. BAIO: Thank you.

(Proceeding adjourned)

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

92 Civ. 7426 (LAP)

SHEERBONNET, LTD.,

Plaintiff,

—against—

AMERICAN EXPRESS BANK LTD.,

Defendant.

JUDGMENT

Defendant having moved to dismiss pursuant to Rule 12(b)(1) and 12(b)(6), F.R.Civ.P., on the ground that the claims of Sheerbonnet Ltd. are beyond the subject matter jurisdiction of the Court, and dismissing the complaint on the ground that plaintiff is barred by an order of Supreme Court, New York County, from asserting its claim against defendant, and the said motion having come before the Honorable LORETTA A. PRESKA, U.S.D.J., and the Court thereafter on March 17, 1993, having handed down its memorandum endorsement; granting defendant's motion to dismiss, under the doctrine announced in *Burford v. Sun Oil Co.* upon the condition that defendant submit to the jurisdiction of the

New York State Court Liquidation Proceeding, see transcript of March 12, 1993, it is,

ORDERED, ADJUDGED AND DECREED: That defendant's motion to dismiss be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed under the doctrine announced in *Burford v. Sun Oil Co.* upon the condition that defendant submit to the jurisdiction of the New York State Court Liquidation Proceeding, see transcript of March 12, 1993.

Dated: New York, New York
March 22, 1993

/s/ James M. Parkison
JAMES M. PARKISON
CLERK

THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 3/23/93.

APPENDIX F

New York Banking Law, §606 provides:

When superintendent may take possession of banking organization; when possession may be surrendered

1. The superintendent may, in his discretion, forthwith take possession of the business and property of any banking organization whenever it shall appear that such banking organization:

(a) Has violated any law;

(b) Is conducting its business in an unauthorized or unsafe manner;

(c) Is in an unsound or unsafe condition to transact its business;

(d) Cannot with safety and expediency continue business;

(e) Has an impairment of its capital; or, in the case of a mutual savings and loan association or credit union, has assets insufficient to pay its debts and the amount due members upon their shares;

(f) Has suspended payment of its obligations; or, in the case of a mutual savings and loan association, has failed for sixty days after a withdrawal application has been filed with it by any shareholder to pay such withdrawal application in full;

(g) Has neglected or refused to comply with the terms of a duly issued order of the superintendent;

(h) Has refused, upon proper demand, to submit its records and affairs for inspection to an examiner of the department;

(i) Has refused to be examined upon oath regarding its affairs.

(j) Has neglected, refused or failed to take or continue proceedings for voluntary liquidation in accordance with any of the provisions of this chapter.

2. The superintendent may, in his discretion, and upon such conditions as may be approved by him, surrender possession and permit such banking organization to resume business.

3. When the superintendent shall have duly taken possession of the property and business of any such banking organization, he may hold such possession until its affairs are finally liquidated by him, unless he shall surrender possession as provided in subdivision two of this section or be enjoined from continuing possession as provided in section six hundred seven of this article, or unless such banking organization shall, with the written approval of the superintendent, voluntarily wind up its affairs as provided in section six hundred five of this article.

4. (a) The superintendent may also, in his discretion, forthwith take possession of the business and property in this state of any foreign banking corporation that has been licensed by him under the provisions of this chapter, upon his finding that any of the reasons enumerated in subdivision one of this section exist with respect to such corporation or that it is in liquidation at its domicile or elsewhere or that there is reason to doubt its ability or willingness to pay in full the claims of the creditors hereinbelow described. Title to such business and property shall vest by operation of law in the superintendent and his successors forthwith upon taking possession. Thereafter the superintendent shall

liquidate or otherwise deal with such business and property in accordance with the provisions of this chapter applicable to the liquidation of banking organizations, except that he may deal with such business and property and prosecute and defend any and all actions relating thereto in his own name as superintendent. Only the claims of creditors of such corporation arising out of transactions had by them with its New York agency or agencies, or with its New York branch or branches, shall be accepted by the superintendent for payment out of such business and property in this state as provided in this article. Acceptance or rejection of such claims by the superintendent shall not prejudice such creditors' rights to otherwise share in the assets of such corporation. The following claims shall not be accepted by the superintendent for payment out of such business and property in this state: (1) claims which would not represent an enforceable legal obligation against such branch or agency if such branch or agency were a separate and independent legal entity; and (2) amounts due and other liabilities to other offices, agencies or branches of, and affiliates of, such foreign banking corporation.

(b) Whenever the accepted claims, together with interest thereon, and the expenses of the liquidation have been paid in full or properly provided for, the superintendent upon the order of the supreme court shall turn over the remaining assets to the principal office of such foreign banking corporation, or to the duly appointed domiciliary liquidator or receiver of said foreign banking corporation. Dividends and other amounts remaining unclaimed or unpaid in the hands of the superintendent for six months after such turn-over shall be deposited by him as provided in article two of this chapter.

(c) As used in this subdivision the phrase "business and property in this state" includes, but is not limited to, all property of the foreign corporation, real, personal or mixed, whether tangible or intangible, (1) wherever situated, constituting part of

the business of the New York agency or branch and appearing on its books as such, and (2) situated within this state whether or not constituting part of the business of the New York agency or branch or so appearing on its books.

(d) For the purposes of this subdivision, the words "debts", "obligations", "deposits" and other similar terms as used in subsequent sections of this article, shall be deemed to refer to the claims that the superintendent shall accept pursuant to paragraph (a) of this subdivision, the words "creditors" and "depositors" shall be deemed to refer to the owners of such accepted claims and, except when the context shall otherwise require, the terms "banking organization" and "corporation" shall be deemed to refer to the New York agency or agencies or branch or branches and the word "officer" shall include the agent or other person in charge of such agency or agencies and any person in charge of or who is an officer of such branch or branches. As used in this subdivision, (i) "affiliate" shall mean any person, or group of persons acting in concert, that controls, is controlled by or is under common control with such foreign banking corporation and (ii) "control" means any person, or group of persons acting in concert, directly or indirectly, owning, controlling or holding with power to vote, more than fifty percent of the voting stock of a company, or having the ability in any manner to elect a majority of the directors of a company, or otherwise exercising a controlling influence over the management and policies of a company as defined by the superintendent by regulation. For purposes of this subdivision, the term "person" shall mean a corporation, unincorporated association, partnership, or any other entity or individual.

5. The term "banking organization" as used in this and subsequent sections of this article shall be deemed to include a corporation which has engaged in any business or other activity prohibited by section one hundred thirty-one of this chapter, and

an unincorporated association, partnership, fiduciary or individual who has engaged in any business or other activity prohibited by section one hundred eighty of this chapter.

APPENDIX G

28 U.S.C. § 1332 provides:

Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of

interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.